# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statutes involved | 2 |
| Statement | 2 |
| Specification of errors to be urged | 5 |
| Reasons for granting the writ | 5 |
| Conclusion | 9 |
| Appendix | 10 |


## CITATIONS


| | |
|---|---|
| **Cases:** | |
| *Commissioner* v. *Forest Glen C. Co.*, 98 F. 2d 968, certiorari denied, 306 U. S. 639 | 7, 8 |
| *Cornelius Cotton Mills* v. *Commissioner*, 4 B. T. A. 255 | 8 |
| *Couch, B. T., Glue Co.* v. *Commissioner*, 12 B. T. A. 1321 | 8 |
| *Gould-Merserau Co.* v. *Commissioner*, 21 B. T. A. 1316 | 8 |
| *Greenleaf Textile Corp.* v. *Commissioner*, 26 B. T. A. 737, affirmed, 65 F. 2d 1017 | 7 |
| *Heyl* v. *Commissioner*, 34 B. T. A. 223 | 8 |
| *Jones* v. *Commissioner*, 34 B. T. A. 280 | 8 |
| *Morrison Woolen Co.* v. *Commissioner*, 10 B. T. A. 8 | 7 |
| *Red Wing Potteries, Inc.* v. *Commissioner*, 43 B. T. A. 841 | 8 |
| *Ribbon Cliff Fruit Co.* v. *Commissioner*, 12 B. T. A. 13 | 8 |
| *Stanfield* v. *Commissioner*, 8 B. T. A. 787 | 7 |
| *Union Telephone Co.* v. *Commissioner*, 41 B. T. A. 152 | 8 |
| *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540 | 6, 7, 8 |
| *Will County Title Co.* v. *Commissioner*, 38 B. T. A. 1396 | 8 |
| **Statutes:** | |
| Internal Revenue Code: | |
| Sec. 1100 (U. S. C. Title 26, Sec. 1100) | 6 |
| Revenue Act of 1934, c. 277, 48 Stat. 680: | |
| Sec. 271 | 10 |
| Sec. 272 | 6, 7, 10 |
| Sec. 322 | 7, 11 |
| Revenue Act of 1936, c. 690, 49 Stat. 1648: | |
| Sec. 271 | 11 |
| Sec. 272 | 7, 11 |
| Sec. 322 | 7, 11 |

Statutes—Continued. Page

Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess.:
Sec. 504 ..... 6, 11

Miscellaneous:
H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 172–173 ..... 6
H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 72 ..... 6

# In the Supreme Court of the United States

OCTOBER TERM, 1942

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

*v.*

GOOCH MILLING & ELEVATOR COMPANY

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered on January 29, 1943, reversing the decision of the United States Board of Tax Appeals.

## OPINIONS BELOW

The memorandum opinion of the Board of Tax Appeals (R. 12–14) is unreported. The opinions of the Circuit Court of Appeals (R. 27–38) are reported in 133 F. 2d 131.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 29, 1943 (R. 38). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

The Commissioner determined a deficiency in taxes for the fiscal year ending June 30, 1936, by adjustment of inventories, and the taxpayer appealed to the Board of Tax Appeals from the determination. Taxpayer alleged that there had been an overpayment for the fiscal year 1935 and applied to the Board for offset against the deficiencies for 1936. The question presented is whether the Board has jurisdiction to determine and to apply any overpayment of tax for the fiscal year 1935 against the deficiencies in tax for the fiscal year 1936.

## STATUTES INVOLVED

The applicable statutes are set out in the Appendix, *infra*, pp. 10–12.

## STATEMENT

The taxpayer is a corporation (R. 13). Following the death of its president on June 11, 1938, an audit of the company's books disclosed that all inventories as far back as 1928 had been erroneously overstated. The reduced inventory for the fiscal year ended June 30, 1936, was

computed by the taxpayer's accountants and was accepted by the Commissioner as the basis for determining deficiencies in income tax of $4,731.69, and in excess profits tax of $1,931.73, for the fiscal year 1936. (R. 12–14.)

On its income tax return for the fiscal year 1936, the taxpayer had reported a net loss of $5,533.47. The Commissioner reduced the opening inventory at July 1, 1935, by $237,104.33 and the deficiencies result primarily from that adjustment. (R. 13.)

Based upon corrected inventories, the taxpayer had overpaid its income taxes for all the fiscal years 1928 to 1934, inclusive, in excess of $8,000. A revenue agent's report for the fiscal year 1935 showed an overassessment of $7,935.58. The refund of this amount, however, was barred by the statute of limitations. (R. 14.)

Taxpayer's original petition to the Board (R. 3) alleged that there were no deficiencies in income and excess profits taxes for the fiscal year ending June 30, 1936, claimed a refund due of $8,288.43, and alleged that the Commissioner had erroneously reduced the taxpayer's inventory at June 30, 1935, in the aggregate amount of $238,277.63, which was added to the taxpayer's income for the fiscal year ended June 30, 1936, but was not deducted from the taxpayer's income for the fiscal year ended June 30, 1935 (R. 6, 13). On April 30, 1941, the taxpayer filed a motion with the Board requesting leave to file an amended petition which repeated the allegations of the original

petition and added paragraphs 3½, 4a½ and 4½ (R. 3).

The amended petition (R. 5–8) alleged that if the adjusted inventory used by the Commissioner for the fiscal year ended June 30, 1936, were used in computing the taxable income for the fiscal year ended June 30, 1935, there would be a net loss for 1935 and an overassessment of the entire amount ($11,038.73) of the tax paid for that year (R. 6–7). The amended petition requested that the overassessment for the fiscal year 1935, a year which was not before the Board, be applied as an offset or recoupment against the deficiencies in tax found for the fiscal year 1936 (R. 8).

The amended petition was lodged with the Board and the motion for leave to amend was taken under advisement pending consideration of the case on its merits. The Commissioner objected to the filing of the amended petition upon the ground that the Board was without jurisdiction to consider the matters therein contained which related to tax liability for the fiscal year ended June 30, 1935, a year in which no deficiency in tax had been found by the Commissioner. (R. 13.)

The Board held that it had no jurisdiction to apply the doctrine of equitable recoupment and denied the motion for leave to file the amended petition (R. 14). The court below (R. 27), one judge dissenting (R. 36), reversed the Board and remanded the case for further proceedings. This

will require the Board to determine, by an adjustment of inventories for the fiscal year ending June 30, 1935, whether there was an overpayment of tax for that fiscal year and, if so, to offset the overpayment against the deficiencies in taxes found for the fiscal year ending June 30, 1936, the only tax year before the Board.

### SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the Board of Tax Appeals has jurisdiction to apply an overpayment of tax for the fiscal year ending June 30, 1935, a year where no deficiency in tax had been found by the Commissioner and no appeal had been taken to the Board, against deficiencies in tax found for the fiscal year ending June 30, 1936.

2. In holding that the Board of Tax Appeals has jurisdiction to determine an overpayment of tax for a year in which no deficiency in tax had been found by the Commissioner.

3. In holding that the Board of Tax Appeals has jurisdiction to apply the equitable doctrine of recoupment or set-off.

4. In reversing the decision of the Board of Tax Appeals.

### REASONS FOR GRANTING THE WRIT

The question presented involves a basic issue of the power and jurisdiction of the Board of Tax Appeals, and is a question of general importance in the administration of the tax laws. Congress

has provided and this and other courts, and the Board itself, have long considered, that the Board has no power to apply the doctrine of recoupment, and has no jurisdiction to determine an overpayment of taxes for a year which is not before the Board. In holding to the contrary, in a divided decision, the court below has unsettled a question of the Board's power and jurisdiction and of the general scheme of tax litigation which heretofore has been considered to be well accepted.

The Board of Tax Appeals[1] is a tribunal whose jurisdiction is limited by statute to the taxable year in which a notice of deficiency in tax has been mailed by the Commissioner and a petition has been filed by the taxpayer with the Board. Section 272 (a) of the Revenue Acts of 1934 and 1936 (Appendix, *infra*); *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 542. The Board may determine an overpayment in tax only in respect of a taxable year in which the Commissioner has determined a deficiency in tax. *United States ex rel. Girard Co.* v. *Helver-*

[1] The name of the Board of Tax Appeals was changed to The Tax Court of the United States, effective October 22, 1942, by Section 504 (a) of the Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess., amending Section 1100 of the Internal Revenue Code. But Section 504 (b) of the Revenue Act of 1942 provided that the jurisdiction powers and duties shall be the same as provided by existing law in the case of the Board of Tax Appeals. See H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 172–173; H. Conference Rep. No. 2586, 77th Cong., 2d Sess., p. 72.

*ing, supra; Morrison Woolen Co.* v. *Commissioner,* 10 B. T. A. 8, 9; *Stanfield* v. *Commissioner,* 8 B. T. A. 787, 819. The Board has no jurisdiction unless a deficiency in tax is found by the Commissioner. Section 322 (d) of the Revenue Acts of 1934 and 1936 (Appendix, *infra*). The Board in redetermining a deficiency in respect of any taxable year is authorized to consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency "but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid." Section 272 (g) of the Revenue Acts of 1934 and 1936 (Appendix, *infra*); *Commissioner* v. *Forest Glen C. Co.,* 98 F. (2d) 968 (C. C. A. 7), certiorari denied, 306 U. S. 639; *Greenleaf Textile Corp.* v. *Commissioner,* 26 B. T. A. 737, affirmed, 65 F. 2d 1017 (C. C. A. 2).

In holding that the Board's jurisdiction extends to all cases of an overpayment of a tax for any year, as long as the taxpayer is before the Board contesting a deficiency covering a different year, the majority of the court below thus ran counter to the unambiguous terms of the statute. Principles which are not reconcilable with those of the court below have been enunciated. In *United States ex rel. Girard Co.* v. *Helvering,* 301 U. S. 540, this Court held that the Board of Tax Appeals was without jurisdiction to order a refund

or credit of overpayment of taxes but is limited to the determination of the amount of a deficiency or overpayment upon the petition of a taxpayer to review a deficiency in tax found by the Commissioner. In point, too, is *Commissioner* v. *Forest Glen C. Co.*, 98 F. 2d 968, 970 (C. C. A. 7), certiorari denied, 306 U. S. 639, in which it was held that where the Commissioner had determined a deficiency in tax for one taxable year, the Board, on an appeal to it from such determination, lacked jurisdiction to determine the tax for another taxable year.

The Board has consistently and uniformly denied its jurisdiction in such cases. It had held that it has no jurisdiction of overpayments,[2] and it has denied its power to allow recoupment or set-off of taxes overpaid, for any year other than that for which a deficiency in tax has been determined by the Commissioner.[3] The holding of the court below overrules these principles long estab-

[2] *Will County Title Co.* v. *Commissioner*, 38 B. T. A. 1396, 1397; *Union Telephone Co.* v. *Commissioner*, 41 B. T. A. 152, 153; *Cornelius Cotton Mills* v. *Commissioner*, 4 B. T. A. 255, 256–257; cf. *United States ex rel. Girard Co.* v. *Helvering*, *supra*.

[3] *Red Wing Potteries, Inc.*, v. *Commissioner*, 43 B. T. A. 841, 845–846; *Heyl* v. *Commissioner*, 34 B. T. A. 223; *Jones* v. *Commissioner*, 34 B. T. A. 280; *Gould-Mersereau Co.* v. *Commissioner*, 21 B. T. A. 1316; *B. T. Couch Glue Co.* v. *Commissioner*, 12 B. T. A. 1321; *Ribbon Cliff Fruit Co.* v. *Commissioner*, 12 B. T. A. 13; *Cornelius Cotton Mills* v. *Commissioner*, 4 B. T. A. 255; cf. *Jones* v. *Commissioner*, 34 B. T. A. 280.

lished by the Board in delimiting its own jurisdiction.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
*Solicitor General.*

APRIL 1943.

## APPENDIX

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this title in respect of a tax imposed by this title "deficiency" means—

(a) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; * * *.

* * * * *

SEC. 272. PROCEDURE IN GENERAL.

(a) *Petition to Board of Tax Appeals.*—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 90 days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

* * * * *

(g) *Jurisdiction Over Other Taxable Years.*—The Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the

taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency, but in so doing shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid.

* * * * *

SEC. 322. REFUNDS AND CREDITS.

* * * * *

(d) *Overpayment Found by Board.*—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax unless the Board determines as part of its decision that it was paid within three years before the filing of the claim or the filing of the petition, whichever is earlier.

* * * * *

The corresponding sections of the Revenue Act of 1936, c. 690, 49 Stat. 1648, are the same as the above sections of the Revenue Act of 1934.

Revenue Act of 1942, Public Law 753, 77th Cong., 2d Sess:

SEC. 504. CHANGE OF NAME OF BOARD OF TAX APPEALS.

(a) *The Tax Court of the United States.*—Effective on the day after the date of enactment of this Act, section 1100 (relating to status of Board of Tax Appeals) is amended by inserting at the end thereof

the following new sentence: "The Board shall be known as The Tax Court of the United States and the members thereof shall be know as the presiding judge and the judges of The Tax Court of the United States."

(b) *Powers, Tenure, Etc., Unchanged.*—The jurisdiction, powers, and duties of The Tax Court of the United States, its divisions and its officers and employees, and their appointment, including the designation of its officers, and the immunities, tenure of office, powers, duties, rights, and privileges of the presiding judge and judges of The Tax Court of the United States shall be the same as by existing law provided in the case of the Board of Tax Appeals. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943